85-2008

Supreme Court, U.S.
FILED
JUN 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85—.....

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

—o—

JAMES D. BROWN

Petitioner

v.

LOUIS J. ROGERS, GEORGE T. ROGERS, VERNON WALTER HEATH,JR. and WHEATLEY TRUCKING , INC. a Maryland corporation

Respondents

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondents pro se

Paul G. Evans
110 Merrain Road
Palm Beach,FL 33480
305-844-3382
Counsel for Petitioner

USPP

No. 85—.....

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JAMES D. BROWN

Petitioner

v.

LOUIS J. ROGERS, GEORGE T. ROGERS, VERNON WALTER HEATH,JR. and WHEATLEY TRUCKING , INC. a Maryland corporation

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

This Court is asked to determine if the trial court in the action captioned Brown v. Louis and George Rogers, cross-defendant and impleaded defendant, respectively, and Heath and Wheatly Trucking, defendants, C/A JH 80-855, U.S. District Court for

Maryland had jurisdiction of Brown's claim in the original complaint in the two vehicle accident diversity action filed April 9,1980, by Louis Rogers, the driver of Brown's Mark V Lincoln Continental (Mark V) and Brown as the owner and co-plaintiff in a permissive joinder action seeking, respectively, damages for personal injury and property damage for the destruction of Mark V when only Louis Rogers' claim satisfied the monetary amount set forth in 28 U.S.C. § 1332 on the theory of pendent jurisdiction. It is also asked to determine if the trial court had jurisdiction of the supplemental and cross-complaint filed after Rogers' claim had been paid and the settlement agreement had been breached as to Brown against Louis Rogers as a cross-defendant and George Rogers, his brother, as an impleaded defendant and Heath and Wheatley Trucking, the driver and owner of the other vehicle respectively and defendants under both complaints. The claim

against the Rogers was founded in conspiracy and fraud and deceit arising out of the obtaining of possession of the Mark V by the Rogers. Brown again did not meet the minimum monetary amount called for by the statute and thus asserted jurisdiction on the theory of pendent or ancillary jurisdiction.

There was complete diversity among all the adverse parties.

If Louis Rogers were to lose his claim against Heath and Wheatley, Brown if a party would also lose by res judicata and if not a party by collateral estoppel or preclusion. He would have, however, a claim against the Rogers under Counts I and II for conspiracy and fraud and deceit.

The trial court,on the basis of Zahn, infra, without distinguishing or referring to Rieser v. District of Columbia, 563 F.2d 462,469, 183 U.S.App.D.C. 375, 382 (1977), aff'd en banc on other jurisdictional grounds 580 F.2d 647, 188 U.S.App.D.C. 384 (1978),

affirmed the Magistrate's Recommendation who had not apparently read the motion for partial summary judgment of Brown wherein he cited Rieser. Brown appealed, sought summary reversal which was denied withou opinion, and was non suited by the unpublished opinion of the Court of Appeals dated January 2,1986, which specifically states the the trial judge was correct in dismissing on the basis of Zahn, Docket No. 84-2380. Thus the question for review is whether a district court in a diversity case may assume jurisdiction over a claim for less that $10,000 when it is dependent on a claim of another party that meets the jurisdictional minimum.

PARTIES

The parties are as set forth in the caption hereof.

TABLE OF CONTENTS & AUTHORITIES

QUESTION PRESENTED FOR REVIEW 1

OPINIONS BELOW 8

GROUNDS FOR THIS COURT'S JURISDICTION 9

STATUTE INVOLVED 10

STATEMENT OF CASE 10

ORIGINAL BASIS OF JURISDICTION 17

REASONS FOR GRANTING WRIT 17

APPENDIX

Table of Cases

Aldinger v. Howard, 427 U.S. 1 (1976) 20

Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971), cert. denied 405 U.S. 944 (1972) 19

Astor-Honor,Inc. v. Gosset & Dunlop,Inc. 441 F.2d 627 (2d Cir. 1971) 18

Cameron v. M'Roberts, 16 U.S. (3 Wheat.) 591 (1818) 24

Corporation of New Orleans v. Winter, 14 U.S. (1 Wheat.) 91 (1816) 24

Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971) 18

Owens Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978) 25

Peninsular Iron Co. v. Stone, 121 U.S. 631, 633 (1887) 24

Rieser v. District of Columbia, 563 F.2d 462, 183 U.S.App.D.C. 375 (1977) aff'd en

banc on other jurisdictional grounds, 580 F.2d 647, 188 U.S.App.D.C. 384 (1978) 3,6,16

Snyder v. Harris, 394 U.S. 332 (1969) passim

Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 287 (1806) 23-26

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 20,21,22,26

Zahn v. International Paper Co., 414 U.S. 291 (1973) affirming 469 F.2d 1033 (2d Cir. 1972) affirming 53 F.R.D. 430 (D. Vt. 1971) passim
See also 42 U.S.L.W. (U.S.Oct. 23,1973) 3233, 3234 and 77 Colum L. Rev. 127, 137 n. 51 (1977)

OTHER AUTHORITIES

Title III § 2 U.S. Constitution 20,22

28 U.S.C. §1332 passim

28 U.S.C. § 1292(b) 17
WRIGHT, MILLER & COOPER, 14A FEDERAL PRACTICE and PROCEDURE, JURISDICTION 2d
§ 3705 pp. 98 et seq. (2d ed. 1985) 19,20
13B §§ 3567-3567.2 20
13 § 3523 19
14 § 3704 pp. 424-430 (1983) 20
14A § 3704 pp. 88-94 (1985) 20

DAVID P. CURRIE, Pendent Parties, 45 U. Chi. L. Rev. 753 (1979) passim 19,21-24

JOSEPH M. MCLAUGHLIN, Practice Commentaries, New York CPLR § 301 at C301:4 Forum Non Conveniens p. 15 (1963) 27

Comment, Aldinger v. Howard, and Pend-

ent Jurisdiction, 77 Colum. L. Rev. 127, 147 n. 107 (1977) 18,20

Recent Developments, In Federal Class Actions Separate and Distinct Claims May Not Be Aggregated to Satisfy the Amount in Controversy Requirement, Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972) cert. granted 41 U.S.L.W. 3441 (U.S. Feb. 20,1973) (No. 888), 61 Geo.L.J. 1327, 1335 n. 68, passim 20

Note, A Closer Look at Pendent and Ancillary Jurisdiction Towards a Theory of Incidental Jurisdiction, 95 Harv. L. Rev. 1935, 1947-49 1950-51 n. 93, 1954 (1982) 20

OPINIONS BELOW

There are three opinions from the lower courts:

1. Magistrate Smalkin's Report and Recommendation dated September 11,1984, and designated NR. (document number) 26 on the docket entry sheet of the trial court, United States District Court for Maryland C/A No. JH 80-855.

2. Memorandum Opinion of the trial judge, The Hon. Joseph C. Howard, dated November 19,1984, NR. 66.

3. THE UNPUBLISHED OPINION of the panel comprised of The Honorable Emory M. Sneeden, James Harvie Wilkinson,III, and James M. Sprouse, dated January 2,1986.

In addition that panel denied without opinion by Order filed June 12,1985, Petitioner's Motion for Summary Reversal on the ground primarily of Pendent Jurisdiction mailed for filing on January 25,1985, and his petition for rehearing with the suggestion en banc mailed for filing on January 10,1986 by Order filed

February 5,1986.

Copies of the foregoing opinions are hereinafter set forth in the appendix hereto. Petitioner is unaware of any references to the foregoing opinions in any official or unofficial reports.

GROUNDS FOR THIS COURT'S JURISDICTION

The statutory source of this Court's jurisdiction is 28 U.S.C. § 1254(1):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to the civil or criminal case, before or after rendition of judgment or decree;

Pursuant to Order of this Court dated May 5,1986, No. A-834, the time for filing a writ of certiorari in this matter was extended until June 5,1986. As noted above the Petition for Rehearing was denied by Order filed February 5,1986, and ninety days thereafter is May 6,1986. The final day to move for an extension of time is April 28,1986, and the Application was mailed Sunday April 27,1986.

STATUTE INVOLVED

This matter involves 28 U.S.C. § 1332:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
> (1) citizens of different states
> * * *
> (c) For the purposes of this section * * * a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business:

STATEMENT OF CASE

This is a relatively simple case involving a two vehicle accident and a cross-complaint impleading a new defendant and one of the original plaintiffs for conspiracy and fraud and deceit. All the adverse parties are citizens of different states. The original complaint filed on April 9,1980, by the Baltimore firm of Kaplan, Hyman, Greenberg, Engelman & Belgram, P.A. (herein Kaplan firm) apparently on behalf of Petitioner Brown herein and Louis Rogers and by Arthur Webster of Salisbury, Maryland (herein Webster) on behalf of Louis Rogers only was by Order

filed February 17,1981,NR. 14, conditionally dismissed without prejudice "to the right of a party to move for good cause within 45 days if settlement is not consummated." The draft of $7,500 called for by the Settlement Agreement delivered to Brown was not honored on presentment for payment although the settlement draft given the co-plaintiff Louis Rogers was duly paid in an amount in excess of $10,000 exclusive of interest and costs. The co-plaintiffs initially had agreed that neither would settle without the other. Brown dismissed his trial counsel Jeffery Pritzker (Pritzker) who had not filed any documents except his notice of appearance on January 13,1981, NR. 13, and his motion for leave to withdraw dated September 10,1981, NR. 17, and retained the undersigned counsel. Brown moved to vacate the settlement agreement and for leave to file a cross-complaint against Louis Rogers and to implead George Rogers, the brother of Louis, as well as to continue his suit against Wheatley Trucking and

Heath. The motion was granted without any opposition by the trial judge and the supplemental and cross-complaint,NR.19, was duly filed on March 24,1982, naming all the parties with an interest in the matter: Brown the owner of the Mark V, Louis Rogers his co-plaintiff, as a cross-defendant in the action for conspiracy and fraud and deceit and his brother George Rogers, the impleaded defendant under those counts, I & II, and Wheatley and Heath, the original defendants under the complaint of April 9,1980. A companion action in negligence was filed on May 20,1980, by Pritzker for Brown in the Circuit Court for Dorchester County, Maryland, No. 4335, and joined in by George Rogers who was represented by Webster, on September 22,1980, alleging damages by reason of the impairment of his rights to sell Mark V under his agreement with Brown on account of the negligence of Heath and the vicarious liability of Wheatley, was dismissed without prejudice in July of 1982, on the ground of the pending action in the federal court. In

fact Louis Rogers never joined the state court action, and only the federal action comprised all the interested parties but for George Rogers who did not voluntarily join that action as he had the state court proceeding but was required to be impleaded. As a defendant on the cross-complaint he did not assert any claim against anyone for the so called impairment of his rights under his agreement to sell the Mark V with Brown. The original complaint prayed for damages on behalf of Brown of $12,000 but the proposed pre-trial order dated February 12,1981, lodged by the Kaplan firm set forth Brown's damages at $9,000. This proposed order was not signed on behalf of Brown by Pritzker and there was not even a place for his signature although leave for his withdrawal was not authorized until September 10,1981, NR. 17., and the undersigned entered his appearance by filing for Brown a motion for leave to file supplemental pleadings on July 28,1981, NR. 16. The supplemental complaint alleged damages against

Heath and Wheatley as determined by the jury and against the cross-defendants Louis and George Rogers for punitive and compensatory damages each in excess of $10,000.

The matter was referred to Magistrate Smalkin to decide all pending motions by Order filed July 16,1984, NR. 58. The Magistrate by letter dated September 7,1984, stated "As you know, a hearing was scheduled in this case for September 21,1984. Upon further review of the file, I have determined that the pending matters (sic) may be decided without the necessity of an oral hearing. Therefore, pursuant to Local Rule 6 of this District, no oral hearing will be held on the pending matters (sic) in this case, and you may disregard the September 21 hearing date previously set." He concluded that the court was without subject matter jurisdiction: "In addition,with respect to the amounts claimed in Counts I and II, this Court is of the opinion that these claims were not made in good faith, but were alleged solely in order to obtain

federal diversity jurisdiction", p. 10 A. p. 14, and "By his [Brown's] own estimation, as evidenced by the sale agreement between him and George Rogers, plaintiff's vehicle was worth $7,000 at the time of the accident. Even allowing some reasonable profit on resale, the car's value could not conceivable have exceeded $10,000. Beyond that, aside from the bald allegations that he suffered the loss of the use of his car, no amount has been stated by plaintiff regarding how much was spent (and for what period) in renting a substitute vehicle. Thus despite defendants' challenge to the jurisdictional amount, plaintiff has provided no other evidence to indicate the amount in controversy exceeds $ 7,000. Therefore, plaintiff has failed in his burden of satisfying the Court that the jurisdictional amount requirement as against Heath and Wheatley Trucking is really and substantially satisfied," p. 6. A. pp. 8-9.

Brown on September 20,1984, NR. 60, objected to the Report on the ground that it ignored

his claim of pendent jurisdiction set forth in his motion for partial summary judgment filed May 26,1982, NR. 26. He continued to urge this ground in his motion for summary reversal and brief before the Court of Appeals.

Although Brown urged below that the rules concerning aggregation also vested the courts below with jurisdiction, in this petition he confines himself to the doctrine of pendent or ancillary jurisdiction which was first advanced in his motion for partial summary judgment and vigorously asserted thereafter:

> The main defense apparently of the defendants herein is that the amount of the claim is less than $10,000.
> It is submitted that assuming arguendo that such be so—in fact the claim for punitive damages is in excess of $10,000— this Court has pendent jurisdiction over such claim by reason of the claim for personal injuries of Louis J. Rogers and maintains such jurisdiction even though such claims are denied, dismissed or settled. See in this regard Rieser v. District of Columbia, [supra].

ORIGINAL BASIS OF JURISDICTION

Jurisdiction was asserted in the complaint of April 9,1980, and thereafter under 28 U.S.C. § 1332. In addition from the time of the motion for partial summary jurgment, pendent or ancillary jurisdiction was relied upon before the trial court and the Court of Appeals.

REASON FOR GRANTING WRIT

The case relied upon by the trial court and the panel of the Court of Appeals is Zahn v. International Paper Co., 53 F.R.D. 430 (D. Vt. 1971, C.J. Leddy) ordering the action not proceed as a class action and granting an interlocutory appeal under 28 U.S.C. § 1292(b), 469 F.2d 1033 (2d Cir. 1972) affirming with dissenting opinion by Judge Timbers, petition for rehearing en banc denied by vote of 4 in favor of motion and 3 against, opinion sustaining denial by Judge Kaufman concurred in by Judges Mansfield and Mulligan, opinion sustaining denial of motion by Judge Mansfield concurred in by Judges Kaufman and

Mulligan, dissenting opinion by Judge Timbers concurred in by Judge Oakes; aff'd 414 U.S. 291 (1973) opinion for the Court by Mr. Justice White, dissent by Mr. Justice Brennan with Messrs. Justices Douglas and Marshall joining dissent. See also 42 U.S.L.W. 3233 (U.S. October 23,1973) and 77 Colum. L. Rev. 127, 137 n. 51 (1977). The panel in the Second Circuit was comprised of Judges Smith who wrote the opinion for the Court, Moore who concurred and Timbers who dissented. Judge Friendly disqualified himself and there was a vacancy in the 9 judge complement set forth at 28 U.S.C § 44. Judges Smith and Moore were not able to vote and a majority of the complement—5 was required to grant en banc hearing. Thus although there was one more vote for enbancing than against, the motion was denied for lack of a majority. Although not mentioned in the dissent Judge Friendly authored opinions for the Circuit in Leather's Best,Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971), Astor-Honor, Inc. v. Gosset &

Dunlap,Inc, 441 F.2d 627 (2d Cir. 1971), and Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971) cert. denied 405 U.S. 944 (1972) which authorized pendent part jurisdiction.

Although error in the application of Zahn is not ground in itself for granting certiorari, it is submitted that not only is there a split among the circuits but also within them over pendent party jurisdiction and it is respectfully suggested that the opinion in Zahn has contributed to the lack of uniformity in the decisions in respect thereof. Among those criticizing or commenting on the decision are:

WRIGHT, MILLER & COOPER, 14A FEDERAL PRACTICE and PROCEDURE, JURISDICTION 2d § 3705 pp. 98 et seq. (2d ed.1985); 13B §§ 3567-3567.2 passim; 13 § 3523 passim (herein referred to as Wright).

DAVID P. CURRIE, Pendent Parties, 45 U. Chi. L. Rev. 753 (1978) passim (herein referred to as Currie).

Note, The Concept of Law-Tied Pendent Jurisdiction: Gibbs and Aldinger Reconsidered, 87 Yale L.J. 627,

650 n. 117 (1978).

Comment, Aldinger v. Howard and Pendent Jurisdiction, 77 Colum. L. Rev. 127, 147 n. 107 (1977).

Recent Developments, In Federal Class Actions Separate and Distinct Claims May Not Be Aggregated to Satisfy the Amount in Controversy Requirement—Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972), cert. granted, 41 U.S.L.W. 3441 (U.S. Feb. 20, 1973)(No. 888), 61 Geo. L.J. 1327, 1335 n. 68 passim (1973).

Note, A Closer Look at Pendent and Ancillary Jurisdiction: Towards a Theory of Incidental Jurisdiction, 95 Harv. L. Rev. 1935, 1947-49, 1950-51,n. 93, 1954(1982).

The conflict between the circuits is commented on in Wright 14 § 3704 pp. 424-430 (1983) and 14A § 3704 pp, 88-94 (1985). See Comment, Federal Pendent Subject Matter Jurisdiction—The Doctrine of United Mine Workers v. Gibbs Extended to Persons not Party to the Jurisdiction Conferring

Claim, 73 Colum. L. Rev. 153, 157 nn. 28 & 29 (1973).

In analyzing Currie, his argument may be more tersely put thusly:

I-Snyder v. Harris, 394 U.S. 332 (1969) holds that the claim of each party representing his own interest is a "separate matter in controversy". Thus it follows that the civil action over which 28 U.S.C. § 1332 gives jurisdiction similarly only includes the claim of an individual plaintiff whose claim exceeds $10,000. This is not correct and one civil action or one Constitutional Article III Case may contain more than one matter in controversy.

To illustrate this he hypothesizes: I would not find the matter in controversy in a simple two party action sufficiently great when related federal and state claims each of $6,000 are joined. Under United Mine Workers v. Gibbs, 383 U.S. 715 (1966) there is a single civil action but it is the matter under federal law that must exceed $10,000.

He further reasons that under Snyder it is possible to

hold that each petty claim constitutes a distinct matter in controversy, and in order to avoid unnecessary decision of petty claims, it would have made sense in Zahn to hold that these several matters in controversy constituted a single civil action.

II-In Zahn the Court did not explicitly give a narrow construction to the term "civil action"; it focused on the matter in controversy requirement of § 1332. It did not and could not hold that the matter in controversy was less than $10,000 since it accepted jurisdiction of 4 of the claims of the named plaintiffs.

III-Jurisdiction once established in Zahn extends under Gibbs to the entire civil action. Thus the Court must have implicitly held in Zahn that in denying jurisdiction over the petty claims they were not part of the civil action. It follows that the nonfederal claim against an additional defendant is not part of the civil action over which a federal claim gives jurisdiction unless the defendants share a common and undivided interest.

IIIA-The factual differences between Zahn and the hypothesized case are not significant. Snyder rejected any distinction between class actions and voluntary joinder under Rule 20: "It was in joinder cases . . . that the doctrine that distinct claims could not be aggregated was originally enunciated". I also do not see any reason why Zahn would not apply to multiple defendants as well as multiple plaintiffs or to cases in which the federal claim is based on a federal question rather than diversity for in such cases the statutory language is identical. That the defect for the pendent party is lack of a federal question rather than the amount should not matter; if claims respecting nonjoint parties are not part of the "civil action", they may not be heard unless they independently meet all jurisdictional requirements. The desirability of avoiding multiple proceedings is unaffected by the nature of the jurisdictional defect.

IV-Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 287 (1806) requires complete diversity between adverse parties,

and is based upon Article III § 2 requiring "the matter in controversy" to be "between Citizens of different States". The definition of the same term "matter in controversy" was in issue in both Snyder and Zahn. Snyder holds that the claims of multiple parties without joint interests do not constitute a single "matter in controversy". Strawbridge is consistent with that interpretation for it applied the complete diversity rule only to the case in which there were joint interests. See Cameron v. M'Roberts, 16 U.S. (3 Wheat.) 591 (1818). Both before and after that decision the Court viewed Strawbridge in an entirely different light. See Corporation of New Orleans v. Winter, 14 U.S. (1 Wheat.) 91 (1816) and Peninsular Iron Co. v. Stone, 121 U.S. 631,633(1887). The significance of Winter and Peninsular Iron is that the Court dismissed not only the nondiverse claims but the diverse claims as well. The presence of nondiverse parties destroyed jurisdiction over the entire suit. To follow those decisions today as suggested by the

Court in Owens Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978) would be,contrary to Snyder, to view the claims of multiple nonjoint parties as a single "matter in controversy". For if as Snyder held, such a case contains two matters in controversy the Court should not dismiss them both; it should retain jurisdiction over the diverse one. For example if a Pennsylvania plaintiff sues Pennsylvania and Delaware defendants for $6,000 each, it is inconsistent to hold that "the matter in controversy" is only $6,000 (Snyder) and is incompletely diverse (Strawbridge). If there is one nondiverse matter Strawbridge tells us its amount is $12,000; if there are two matters (Snyder), one of them is diverse.

Conclusion-Zahn by implicitly holding a "civil action" does not include pendent parties, effectively resolves the question. The extended Strawbridge rule, however, implicitly resolves it the other way. The complete diversity rule presupposes that "the matter in controversy" in a "civil action" embraces claims

involving multiple parties with nonjoint interests; if the "matter in controversy" is that broad so is the "civil action" that contains it. The inconsistence is even more obvious under the 1789 statute (Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73) which used the same word to express both ideas: that there was jurisdiction over the "suit" when the "suit" was diverse. The clear implication of the complete diversity rule is that a single "civil action" includes claims involving multiple nonjoint parties. Thus not only does Zahn fail to follow from Snyder as a matter of either statutory language or policy—Zahn is inconsistent with Strawbridge.

Zahn is the bad apple. Gibbs and its policy of efficiency demanded pendent jurisdiction in Zahn. The Court may yet uphold jurisdiction over pendent parties in other contexts at the cost of consistency both in the interpretation of statutory language and in relevant policy.

Although the comments of Professor

Currie are not biding they are perceptive. In addition it is submitted that the doctrine is discretionary and that the only statutory obstacle in a case involving diverse parties is the argument that the will of Congress in controlling the case load of the federal courts may be frustrated by it. It is submitted that the district judge considering the matter is well positioned to weigh the effect of assuming jurisdiction will have on his case load, and if overburdened he can deny on that ground alone pendent jurisdiction. He can also notify the parties that if any are hiding behind procedural bars in the state courts which appear unjust under the circumstances he will grant jurisdiction unless they cease and promise to forego such tactics. See New York CPLR § 301 and the Practice Commentaries (1963) by Joseph M. McLaughlin at C301:4. Forum Non Conveniens p. 15 wherein he states:

> Since the doctrine is equitable in origin, the court may dismiss the action upon reasonable conditions, e.g., that the defendant will consent to jurisdiction in

> a foreign state, that he will not challenge the plaintiff's capacity to sue and that he will not plead the statute of limitations in the foreign state.

In the case at hand discretion was never considered since the courts were under the impression that Zahn deprived them from exercising any jurisdiction much less exercising discretion with respect thereto.

This Court is respectfully urged to issue the writ so that this matter may be definitively settled if the trial court is without statutory authority or conversely to consider when it is appropriate to consider the exercise of discretion in diversity cases when one of the claims is less than $10,000.

Respectfully submitted,

/sPaul G. Evans
Paul G. Evans
110 Merrain Road
Palm Beach,FL 33480
305-844-3380
Counsel for James D. Brown
Petitioner

A P P E N D I X

1. Magistrate's Report and Recommendation 1

2. Memorandium Opinion of Judge Howard 17

3. Unpublished Opinion of the Fourth Circuit 27

4. Article III U.S. Constitution 35

U.S.DISTRICT COURT MARYLAND

Louis J. Rogers and

James D. Brown

Plaintiffs

vs.

Vernon Walter Heath, Jr., and

Wheatley Trucking, Inc., a Maryland Corporation

Defendants

::C.A. JH 80-855

James D. Brown

Cross-Claim Plaintiff

v.

Louis D. Rogers

and

George T. Rogers

Cross-Claim Defendants

MAGISTRATE'S REPORT & RECOMMENDATION

I.

In September, 1979, plaintiff, then a resident of Michigan, and defendant George Rogers,then a resident of New Jersey, entered into an oral agreement over the telephone, whereby George Rogers agreed to take possession of plaintiff's car in order to sell it. Plaintiff was to receive $7,000 from the sale, with George Rogers' profit to be derived from any money in excess of the $7,000 obtained in selling the car. George Rogers flew to Michigan, took possession of the car, and returned to New Jersey.

By November, 1979, plaintiff lost patience with George Rogers' apparent inability to sell the car, and he made arrangements to travel East and regain possession of his vehicle. Late in that month, however, George Rogers told plaintiff that he had finally arranged to sell the car, and subsequently asked plaintiff to send him a power of attorney to enable him to transfer title to the purchaser. Plaintiff complied with this request, but when he later failed to receive his money, he again contacted George

Rogers. On December 31,1979, George Rogers told plaintiff that the car had been demolished in an accident. According to George Rogers, his brother, Louis Rogers, was driving the car to Virginia to show it to a prospective buyer, when it collided with a truck making a U-turn on a Maryland highway. The truck was driven by defendant Vernon Heath, while within the scope of his employment with defendant Wheatley Trucking, Inc.

Plaintiff filed two negligence actions. The first was filed in this Court in April 1980, with plaintiff Louis Rogers as the named plaintiffs and Heath and Wheatley Trucking as the named defendants. The second suit was filed in the Circuit Court for Dorchester County, Maryland, in May, 1980, with plaintiff claiming against defendants Heath and Wheatley Trucking. This latter case was dismissed, without prejudice as to plaintiff, to allow him to pursue his remedies in federal District Court. The April, 1980 federal suit was dismissed in February, 1981, pursuant to a $7,500 settlement agreement.

Plaintiff argues that, as he understood the agreement, he was to receive the full amount of $7,500. However, after receiving and depositing his check, he was advised by his counsel that $500 of it was to be paid to George Rogers. When plaintiff adamantly refused to remit any money to George Rogers, payment on the check was stopped by defendants. Plaintiff then rejected the settlement terms and moved to reopen the case. The motion was granted, to allow plaintiff to file the present complaint, which claims as follows:

COUNT	DEFENDANTS	CLAIM	DAMAGES
I.	George Rogers Louis Rogers	conspiracy to defraud	$10,000 compensatory $10,000 punitive
II.	George Rogers Louis Rogers	fraud and misrepresentation	$20,000 compensatory $20,000 punitive
III.	Vernon Heath Wheatley Trucking	negligence	"the value of [plaintiff's] car and the loss of the use thereof"

The case was referred to me by order of Judge Howard, in accordance with Local Rule 80, D.

Md., for resolution of all pending motions. These motions are:

MOVANT	MOTION	PAPER NO.	DATE
Plaintiff	for partial summary judgment	26	May 26, 1982
Defendants Rogers	to strike plaintiff's letter of December 31,1979	29	June 2,1982
"	for summary judgment	35	Oct. 27,1982
"	for sanctions	37	Nov. 17,1982
"	(renewed)	47	Nov. 26,1982
"	to strike plaintiff's response to defendants' motion for summary judgment	39	Nov. 19,1982
"	to enforce the settlement agreement	41	Nov. 22,1982
"	to strike plaintiff's response to defendants Rogers motions	49	Dec. 3,1982
"	for discovery sanctions against plaintiff	53	Dec. 17,1982
"	to seal plaintiff's "Response to motions by Rogers suggestion that Court impose san-	54	Jan. 4,1983

	ctions sua sponte against counsel for Rogers"		
"	to strike plaintiff's response	56	Jan. 21,1983

II.

The first issue this Court must address is whether it has subject matter jurisdiction over plaintiff's claims. Clearly there is diversity of citizenship between the parties, as required by 28 U.S. C. § 1332. However, under the diversity statute, the amount in controversy must exceed $10,000. The standard by which a federal court determines whether the matter in controversy exceeds that amount is the "legal certainty" test:

> The rule governing dismissal for want of jurisdiction in cases brought in the federal courts is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith.... It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288 (1983). Plaintiff's allegations that the matter in controversy exceeds the jurisdictional

amount is sufficient to meet the test unless—as in the instant case—the amount claimed is challenged. Id., 303 U.S. at 288. The burden then rests on the plaintiff to satisfy the court that the jurisdictional amount is really and substantially involved. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 188 (1936). In addition:

> It is a settled general rule that, in a suit based on diversity of citizenship brought against several defendants on separate and distinct claims depending for their validity upon a common origin, the test of jurisdiction is the amount of each separate claim and not the aggregate amount of the claims.

Fechheimer Bros. Co. v. Barnwasser, 146 F.2d 974, (6th Cir. 1945). Thus, plaintiff must meet the jurisdictional amount as against each defendant under all three of the counts in his complaint.

A.

In his third count, plaintiff prays for compensatory damages against defendants Heath and Wheatley Trucking "for the value of [his] car and the loss of the use thereof...." In Maryland, the measure of damages for destruction of personal property is the

market value of the good at the time and place of destruction. Weishaar v. Canestrale, 241 Md. 676, 217 A.2d 525 (1966). Plaintiff can also recover damages for the loss of use of his automobile, restricted to a reasonable period during which plaintiff was deprived of his vehicle. Schweitzer v. Showell, 19 Md. App. 537, 313 A.2d 97 (1974). In the instant case, plaintiff failed properly to allege the specific amount in controversy, which itself renders the complaint defective, though subject to cure by amendment. Schelesinger v. Councilman, 420 U.S. 738 (1975). However, amendment of this complaint would be fruitless. By his own estimation, as evidenced by the sale agreement between him and George Rogers, plaintiff's vehicle was worth $7,000 at the time of the accident. Even allowing for some reasonable profit on resale, the car's value could not conceivably have exceeded $10,000. Beyond that, aside from bald allegations that he suffered the loss of the use of his car, no amount has been stated by plaintiff regarding how much was spent (and for what period) in renting a

substitute vehicle.[1] Thus, despite defendants' challenge to the jurisdictional amount, plaintiff has provided no other evidence to indicate that the amount in controversy exceeds $7,000. Therefore, plaintiff has failed in his burden of satisfying the Court that the jurisdictional amount requirement as against Heath and Wheatley Trucking is really and substantially satisfied. St. Paul Mercury Indemnity Co., 303 U.S. at 288. For that reason, plaintiff's negligence claim against Heath and Wheatley Trucking should be dismissed for lack of subject matter jurisdiction.

B.

Plaintiff's second and third counts (sic) [should read first and second counts] allege that the Rogers brothers conspired to and actually did commit fraud in their dealings with plaintiff. Under the conspiracy claim in Count I, plaintiff alleged compensatory damages of $10,000,with an equal amount of punitive damages claimed. These damage amounts were both doubled (to $20,000) under the

fraud and misrepresentation claims in Count II.

The amount in controversy is measured by the direct value of the object of the suit or the right sought to be enforced,and it can include punitive damages if those damages are permitted under governing law. Totaro v. Lyons, 498 F. Supp. 621 (D.Md. 1980) Both of plaintiff's claims stem from the breakdown of his contractual relationship with George Rogers. If these claims are pure contract actions, it is well settled under Maryland law that no punitive damages would be recoverable. H & R Block, Inc. v. Testerman, 275 Md. 36, 338 A.2d 48, 52 (1975). However, punitive damages are recoverable in tort actions arising out of contractual relationships, if actual malice can be proved:

> Actual or express malice—at least in this context—has been characterized as the performance of an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff. [Citations omitted]

Id., 338 A.2d at 52. There has been no attempt by plaintiff, in his pleadings or other documents

submitted,to show any evidence of actual malice on either George or Louis Rogers' part. In fact, plaintiff and Louis Rogers have never met nor have they ever had any kind of communication. Their only "connection" is the fact that Louis Rogers was driving plaintiff's car at the time of the accident. With respect to George Rogers, plaintiff alleges that the defendant lied to him concerning the fact that the car had been sold, when in fact it had already been involved in an accident. However, even if this allegation were proved, there would still be no sufficient allegation that George Rogers was guided by an evil or rancorous motive influenced by hate, with a purpose to deliberately and willfully injure plaintiff. Thus, punitive damages would not be recoverable.

Plaintiff argues, however, that the claims raised in his first and second counts are not torts arising from a contractual relationship, but rather are pure tort actions stemming from the Rogers' fraudulent misrepresentations to plaintiff. Under Maryland law, actual malice need not be proved

in order to recover punitive damages on a claim of fraud; only legal malice is required:

> ... [T]o recover punitive damages in actions of deceit, an element of aggravation, evidenced by malicious, deliberate, gross, or wanton conduct... must accompany the fraud.... [W]hile aggravated circumstances must be shown to justify an award of punitive damages in fraud cases, proof of actual malice, as defined in Maryland, is not a prerequisite.

Wedeman v. City Chevrolet Company, 278 Md. 524, 366 A.2d 7, 11-12 (1976).[2]

However, to determine whether a claim is pure tort or a tort arising from a contractual relationship, it must be ascertained whether the alleged fraud induced the making of a contract or whether the fraud arose from the contractual relationship itself. If the contractual relationship existed before the tortious conduct, then it is characterized as a tort arising from a contractual relationship, and the Testerman requirement of actual malice applies to the recovery of punitive damages. Conversely, if the fraud induced the making of the contract, then the deceit stands as a separate tort, and only legal malice is

required to obtain punitive damages under Wedeman. In the instant case, the contractual relationship preceded the alleged tortious conduct. Plaintiff voluntarily relinquished possession of his car to George Rogers, and, in fact, may actually have initiated the contract (the pleadings are unclear on this detail). Only after the contract was formed and George Rogers had possession of the auto did it become apparent to the plaintiff that George Rogers was unable or unwilling to sell the vehicle.

Because plaintiff has not alleged facts sufficient to show actual malice as to these claims, punitive damages cannot be used in the computation of the jurisdictional amount. Therefore, the jurisdictional amount in Count I is reduced to the $10,000 claim for compensatory damages and in Count II to the $20,000 in compensatory damages. Under the statute itself, the jurisdictional amount claimed in Count I is inadequate; the statute requires that the matter in controversy exceed the sum or value of $10,000, exclusive of interests (sic) and costs...." (sic)

28 U.S.C. § 1332. [Emphasis added].

In addition, with respect to the amounts claimed in Counts I and II, this Court is of the opinion that these claims were not made in good faith, but were alleged solely in order to obtain federal diversity jurisdiction:

> On its face, the phrase "good faith" would seem to imply that the relevant consideration is the plaintiff's state of mind and that, therefore, it is a subjective test....But it is obvious that plaintiff's actual mental state can never be satisfactorily measured without recourse to objective facts. Thus, the basic criterion for determining "good faith" is that "it must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."

Janconski v. Avisum Corp., 359 F.2d 931, 934 (3d Cir. 1966). In this case, plaintiff's only damages arose from the destruction of his car, which he himself valued at $7,000. This sum falls short of the $10,000 jurisdictional amount. The additional damages in the complaint are without any factual basis; plaintiff has failed to sustain the Court's jurisdiction by any competent proof. See Payton v. Freeze, 49 F.R.D. 11, 14 (E.D. Va. 1969). Therefore, this Court has no

subject matter jurisdiction over plaintiff's Counts I and II under 28 U.S.C. § 1332. See Arnold v. Troccoli, 344 F.2d 842 (2d Cir. 1965); Christensen v. Northwest Airlines, Inc., 455 F. Supp. 492 (D. Ha. 1978), aff'd., 633 F.2d 529 (9th Cir. 1980).

III.

In conclusion, in accordance with the foregoing report, I respectfully recommend that, upon the expiry of time allowed in FED. R. CIV. P. 72 and Local Rule 82, D.Md., for taking exceptions hereto,an order be entered dismissing this case for lack of subject matter jurisdiction, and thus settling all pending motions as moot.

s/Frederic N. Smalkin
Frederic N. Smalkin
United States Magistrate

Dated Sept. 11,1984

---

1. Plaintiff testified at his deposition that the first two or three substitute vehicles were rented on an ad hoc, informal cash basis during 1979 and 1980: "Something like maybe twenty-five dollars for a couple of days, something like that." (Plaintiff's deposition, Paper No. 36, p. 101). Plaintiff was only able to specify the monthly rate ($150) on the third vehicle,

rented in 1981.

In addition, plaintiff admitted that he purchased a used car, and used it for several months, during the same time that he rented the above mentioned vehicles.

Despite the defendants' request for a copy of the rental and purchase agreements (or affidavits from the renters), plaintiff failed to comply. (Paper No. 48).

2. No party has suggested that any substantive law other than that of Maryland should apply.

(CASE CAPTION p. 1)

MEMORANDUM

On March 24,1982 plaintiff James D. Brown filed a three-count complaint against defendants Louis D. [J.] Rogers and George T. Rogers, and defendants Vernon Walter Heath, Jr., and Wheatley Trucking, Inc., alleging conspiracy to defraud, fraud and misrepresentation, and negligence in the sale and subsequent destruction of his automobile. The Court referred the case to United States Magistrate Frederic N. Smalkin under Local Rule 80 for a proposed ruling on all pending motions. On September 11,1984, Magistrate Smalkin issued his report recommending that an order be entered dismissing the case for lack of subject matter jurisdiction, thereby rendering all pending motions moot. Nine days later, plaintiff filed his objections to the report.

I.

The facts leading to the present

litigation are not complex. They are aptly presented in the Magistrate's report and are reproduced here in full.

[Pages 1-4 of this APPENDIX to Table Captioned COUNT—DEFENDANTS—CLAIM—DAMAGES set forth in haec verba]

II.

Counts I and II of the plaintiff's complaint allege that defendants George T. and Louis D. Rogers [hereinafter referred to as Louis J. Rogers] conspired to defraud him and in fact were fraudulent and deceitful in their dealings with him with respect to the sale of his car. Plaintiff prayed for $10,000 in compensatory and $10,000 in punitive damages against the Rogers' under the conspiracy count (Count I) and $20,000 in compensatory and 20,000 in punitive damages under the fraud and misrepresentation count (Count II).

The Magistrate found that since the "contractual relationship preceded the alleged tortious conduct" actual malice and not legal malice needed to

be proven before punitive damages could be recovered (Report at 9 [herein p. 13]). Magistrate Smalkin then reasoned that " [b]ecause plaintiff ha[d] not alleged facts sufficient to show actual malice as to these claims, punitive damages [could not] be used in the computation of the jurisdictional amount" (id. at 10, herein at 13). This left plaintiff with claims against defendants for compensatory damages totalling $30,000. The Magistrate determined, however, that "these claims were not made in good faith, but were alleged solely in order to obtain federal diversity jurisdiction..." (id. herein 14). Magistrate Smalkin paid particular attention to the fact that "plaintiff's only damages arose from the destruction of his car, which he himself had valued at $7,000 [,]" an amount "short of the $10,000 jurisdictional amount (id. at 10-11 herein 14). Finding no factual basis for the additional damages prayed for in plaintiff's claims, the Magistrate concluded that there was no subject matter jurisdiction under 28 U.S.C. § 1332.

Plaintiff objects to the Magistrate's

findings that "the contractual relationship preceded the alleged tortious conduct." Specifically, he argues that "fraud in the inducement was the way the complaint was formed and [he] will stand on the allegations in the document. SEE PARAGRAPHS 25-29 and 31-34" (Objections to Magistrate's Report and Recommendation at 3). The Court does not read the complaint this way. To be sure, pleadings should be construed liberally. When a litigant has the assistance of counsel, however, a certain degree of clarity and specificity is to be expected in the presentation of claims. This complaint falls far short of that mark. If fraud, in plaintiff's estimation, preceded the formation of the contract, then his counsel should have stated so in a few clear words. He did not. In short, the Court finds that the record in this case supports the Magistrate's determination that "[o]nly after the contract was formed and George Rogers had possession of the auto did it become apparent to plaintiff that George Rogers was unable or unwilling to sell the vehicle" (Report at 10; emphasis in original). This

leads the Court to plaintiff's second objection.

The Magistrate Smalkin found that the jurisdictional amount claimed in Count I ($10,000 in compensatory damages) was inadequate because 28 U.S.C. §1332 requires that "the matter in controversy excee[d] the sum or value of $10,000, exclusive of interest and costs...."[2] Furthermore, he concluded that the claims contained in Counts I and II "were not made in good faith, but were alleged solely in order to obtain federal diversity jurisdiction" (id.herein 14).

Plaintiff objects to the finding and characterizes it as an example of "cavalier reasoning" (Objections to Magistrate's Report and Recommendation at 2). His attack on the Magistrate's finding is three-fold. "First, the initial counsel who represented [him] in this action ... and counsel for the Rogers jointly signed the initial complaint and the PRE-TRIAL ORDER submitted on or before February 6,1981 respectively set forth damages [at] . . . $12,000 and $9,000 . . . . Second [plaintiff] . . . profers [sic] to prove each and every fact set forth in his affidavit.

Third [his] counsel had no reason to inflate the property loss because he unlike the Magistrate was aware of the doctrine of pendent jurisdiction . . ." (id.). The Court finds the plaintiff's objections devoid of any merit.

"Ordinarily the jurisdictional amount [requirement under 28 U.S.C. § 1332] is determined by the amount of the plaintiff's original claim, provided that the claim is made in good faith." Wiggins v. North American Equitable Life Assurance Co., 644 F.2d 1014, 1016 (4th Cir. 1981) (citation omitted); see Payton v. Freeze, 49 F.R.D. 11 (E.D. Va. 1969). Mc Donald v. Patton, 240 F.2d 424, 426 (4th Cir. 1957). As noted by the Supreme Court in St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938):

> [I]f from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, of if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purposes of conferring jurisdiction, the suit [must] be dismissed.

Id. at 289 (footnote omitted); Nixon v. Local Order of

Moose No. 750, 285 F.2d 250, 252 (4th Cir. 1960); Wallace v. Hartford Insurance Co., 583 F. Supp. 1108, 1119 (W.D. Va. 1984); Heavner v. State Automobile Insurance Co. of Columbus, 340 F. Supp. 391, 393 (W.D. Va. 1972).

After reviewing the record in this case, the Court is satisfied that the aforementioned test has been met. Plaintiff directs the Court's attention to his original complaint and the so-called "duly notarized affidavit of December 31,1979" in support of his contention that his claims are made in good faith. As discussed above, however, the legal certainty test does not stop at the litigant's good faith. Indeed, it expressly goes beyond it. The damages prayed for in this litigation arose from the destruction of an expensive automobile. Nevertheless, it appears to a legal certainty that however camouflaged, plaintiff's claims are for less than the jurisdictional amount.

Plaintiff also suggests in his objections that the doctrine of pendent jurisdiction would cure any jurisdictional deficiency present in this case.

Although not very clear, plaintiff's argument seems to be predicated on the concept of pendent party jurisdiction. That is to say, because the jurisdictional amount requirement was satisfied by Louis J. Rogers in the suit plaintiff and Rogers filed against defendants Heath and Wheatley Trucking, the Court can consider his claims against these defendants and the Rogers brothers even though they may be for less than $10,000. The Court disagrees.

Had plaintiff's claim in the original complaint been challenged, it would have been dismissed for failure to meet the jurisdictional amount requirement. Plaintiff could not have relied on the claim of Louis Rogers to sustain his own deficient claim. See Zahn v. International Paper Co., 414 U.S. 291 (1973). His contention that because he participated with Louis Rogers in a previous suit, the Court may entertain his present claims under pendent party jurisdiction is totally meritless. In short, the Court finds that plaintiff's claims against defendants Louis and George Rogers, and defendants Heath and

Wheatley Trucking do not satisfy the jurisdictional amount requirement of 28 U.S.C. § 1332. Accordingly, the Court adopts and accepts the Magistrate's Report and Recommendation that this case be dismissed for lack of subject matter jurisdiction.

A separate order will be entered.

s/Joseph C. Howard
Joseph C. Howard
United States District Judge

Dated: November 19th, 1984

---

[1]In reviewing plaintiff's objections, the Court looks to 28 U.S.C. § 636(b)(1)(C) which provides, in pertinent part:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

See United States v. Blair, 493 F.Supp. 398 (D.Md. 1980), aff'd, 665 F.2d 500 (4th Cir. 1981); cf. Camby v. Davis, 718 F.2d 198 (4th Cir. 1983) (in the absence of objections, no need for court to explain why it adopted magistrate's report).

[2]It should be noted, however, that in considering the claims contained in Counts I and II against the defendants Louis and George Rogers individually, "[e]ven if no single claim [was] for an amount in excess of $10,000, jurisdiction [would] exis[t] for each count." Griffin v. Red Run Lodge, Inc., 610 F.2d 1198, 1204 (4th Cir. 1979) (citations omitted).

UNPUBLISHED PANEL OPINION OF FOURTH CIRCUIT IN 84-2380 DECIDED JANUARY 2,1984 BEFORE THE HONORABLE JUDGES SPROUSE, WILKINSON, AND SNEEDEN

Louis J. Rogers, Plaintiff

and

James D. Brown, Appellant

v.

Louis J. Rogers; George T. Rogers; Vernon Walter Heath, Jr.; Wheatley Trucking, Inc., a Maryland Corporation,
Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge. (C/A 80-855)

Paul G. Evans, for Appellant. Appellees Pro Se.)

PER CURIAM:

James D. Brown appeals from the order of the district court dismissing his complaint filed against

Louis Rogers; George Rogers; Vernon Heath, Jr.; and Wheatley Trucking, Inc. The district court dismissed Brown's diversity action for failure to satisfy the jurisdictional amount. We affirm.

Brown sued brothers Louis and George Rogers for fraud and deceit, and conspiracy to defraud, claiming that the brothers used Brown's car for their own enjoyment while representing to Brown that they were attempting to sell it. Brown claimed that Louis Rogers totaled Brown's car and that George Rogers thereafter continued to tell Brown that he was negotiating the sale of the car, concealing from Brown the fact that the car had been wrecked. Brown sued Heath and Heath's employer, Wheatley Trucking, for negligence, claiming that Heath was at fault in the accident that resulted in the loss of Brown's car. Brown sought compensatory and punitive damages from the Rogers and compensatory damages from Heath and Wheatley Trucking.

In moving to file his supplemental complaint,

Brown stated that the value of the car was $7,500. This figure was also the amount of a prior negotiated settlement agreement and, we find, is the proper figure to use in determining whether Brown's claims satisfy the jurisdictional amount. Under Maryland law, Brown may also recover damages from Heath and Wheatley for the loss of the use of his car restricted to a reasonable period during which Brown was deprived of its use by virtue of the accident. See Schweitzer v. Showell, 19 Md. App. 537, 313 A.2d 97 (1974). We note that Brown was in the process of selling his car at the time of the accident. Assuming, however, that Brown may nevertheless claim for the loss of its use for a reasonable period of time, the claim is for less than $2500 and so does not bring Brown's claim for compensatory damages up to the jurisdictional amount.

The amount in controversy is determined as of the time an action is commenced. See 14A C. Wright, A. Miller, and E.Cooper, Federal Practice and

Procedure § 3702 at 28-29. (2d. ed. 1985). Brown initially filed suit against Heath and Wheatley on April 9,1980. That action was dismissed upon an agreed settlement, but when problems arose with the settlement Brown was permitted to reopen his claims.[1] Brown may not take advantage of the fact that he voluntarily dismissed and then reopened his claims against Heath and Wheatley Trucking, but is bound by the April 9,1980 initial filing date as the outside of any reasonable period for his loss of use claim.

Brown testified at his deposition that he rented cars from friends from December 1979 through the early part of 1980. He stated that he would rent a car for a couple of days, usually over the weekend, and would pay either twenty-five or fifty dollars. Even assuming that Brown rented a car for fifty dollars every weekend between December and April, his claim for loss of use would be substantially less than $2500. We accordingly conclude that the district court correctly determined that Brown's claim for

compensatory damages was, "to a legal certainty," less than $10,000. St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

We now turn to Brown's claim for punitive damages on his fraud claims against George and Louis Rogers. Punitive damages may be included in determining whether the jurisdictional amount has been satisfied if such damages are allowed under governing law. Under Maryland law, if a contractual relationship existed before the tortious conduct, then punitive damages may only be recovered upon a showing of actual malice; but if the fraud induced the making of the contract, a showing of legal malice is sufficient.[2] See Wedeman v. City Chevrolet Co., 278 Md. 524, 366 A.2d 7 (1976). The district court determined that Brown had alleged fraud arising out of his contractual arrangement with George Rogers, not fraud in the inducement of that contract. Therefore, to obtain punitive damages Brown had to show actual malice, defined as an evil or rancorous

motive influenced by hate, with a purpose deliberately and willfully to injure him. The district court concluded that Brown had not asserted and the record did not suggest that the Rogers acted with actual malice. Accordingly, the court rejected Brown's claim for punitive damages and, along with it, his assertion of the jurisdictional amount.

It is appropriate for a district court to scrutinize closely a punitive damage claim used as a basis for federal jurisdiction to ensure that the claim has a colorable foundation in law and fact. See Kahal v. J. W. Wilson & Associates, Inc., 637 F.2d 547, 549 (D.C. Cir. 1982). See also Wiggins v. North American Equitable Life Assurance Co., 644 F.2d 1014 (4th Cir. 1981). Upon a careful review of Brown's complaint and the rest of the record we conclude that the district court properly characterized Brown's claims of fraud as arising out of rather than leading to the contractual relationship. The district court also correctly held that there was no indication that the

Rogers acted out of malice. We accordingly find no error in the district court's conclusion that Brown did not have a colorable punitive damage claim.

In closing we note that Brown has strenuously maintained in the district court and on appeal that the court had pendent jurisdiction of his claims under Stone v. Stone, 405 F.2d 94 (4th Cir. 1968). Stone involved the aggregation of a single plaintiff's claim against several defendants and does not, as argued by Brown, allow the district court to exercise jurisdiction over Brown's claims because the previously dismissed claims of another plaintiff exceeded the jurisdictional amount.[3] The district court properly applied Zahn v. International Paper Co., 414 U.S. 291 (1973), in rejecting Brown's assertion of pendent jurisdiction.

The judgment of the district court is affirmed. We dispense with oral argument because the dispositive issued (sic) recently have been decided authoritatively.

AFFIRMED

---

1. On reopening of the case, Brown added claims against George and Louis Rogers.

2. As noted by the magistrate, the parties have not claimed that any law other than that of Maryland governs the determination of Brown's remedies.

3. Nor can Brown satisfy the jurisdictional amount by aggregating his fraud and negligence claims, as the claims do not arise from a common nucleus of operative fact. See Hales v. Winn-Dixie Stores, Inc., 500 F.2d 836, 847-48 (4th Cir.1974).

ARTICLE III U.S. CONSTITUTION

SECTION. 2 The judicial power shall extend to all cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made,or which shall be made, under their Authority:— * * * to Controversies between two or more States:—between a State and Citizens of another State:—between Citizens of different States * * *